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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Equal Employment Opportunity Commission,

Plaintiff,

vs.

The Cheesecake Factory, Inc., a Delaware
corporation,

Defendant.

Case No. CIV 08-01207-NVW-PHX

MOTION TO INTERVENE

MOTION

Pursuant to Rule 24(a) of the Federal Rules of Civil Procedure and 42 U.S.C. § 2000e-5(f)(1), Plaintiffs-in-Intervention Bryce Fitzpatrick (“Fitzpatrick”) and Albert Miller (“Miller”), by and through their undersigned counsel, hereby move to intervene as plaintiffs in this action. Fitzpatrick and Miller request intervention under Rule 24(a)(1) of the Federal Rules of Civil Procedure on the basis that, as charging parties, they have an unconditional right to intervene. This Motion is accompanied by the proposed Complaint-in-Intervention, which is attached hereto as Exhibit 1.

MEMORANDUM OF POINTS AND AUTHORITIES

BACKGROUND

On or about November 27, 2006, Fitzpatrick filed a Charge of Discrimination with the Equal Employment Opportunity Commission (“EEOC”) against his former employer, The Cheesecake Factory, Inc. (“Cheesecake Factory”), alleging that pervasive sexual harassment at

1 the Cheesecake Factory created a hostile work environment and ultimately led to his
2 constructive discharge. On or about February 27, 2007, Miller filed a Charge of Discrimination
3 alleging a hostile and sexually offensive work environment. Both Charges of Discrimination
4 were timely filed.

5 Fitzpatrick and Miller allege they were unwilling victims of physical, sexual harassment
6 and assaults of an overtly sexual nature committed by numerous employees of the Cheesecake
7 Factory with the knowledge, apparent approval, and tacit encouragement of various levels of
8 management. The pervasive sexual harassment and assaults were reported to managers and on
9 several occasions witnessed firsthand by managers, but Cheesecake Factory managers refused to
10 take reasonable steps to prevent the harassment and assaults from occurring. Despite numerous
11 complaints by Fitzpatrick, Miller and others, Cheesecake Factory managers and supervisors
12 refused to act to protect Cheesecake Factory's employees from assault, battery and false
13 imprisonment in the workplace as well as the pervasive threat of assault, battery and false
14 imprisonment. In effect, Cheesecake Factory forced its employees, including Fitzpatrick and
15 Miller, to endure the actual and threatened physical assaults of a sexual nature as a condition of
16 continued employment with the Complaint and thereby created a hostile work environment
17 offensive to the reasonable person.

18 By failing and refusing to act to protect its employees in the workplace and ignoring the
19 threat to the safety of its employees, Cheesecake Factory condoned the actions of those
20 responsible for committing the tortious and unlawful actions, and allowed them to commit those
21 actions in the course and scope of employment, and therefore is vicariously liable for the actions
22 of its employees. Cheesecake Factory perpetuated a hostile workplace environment of sexual
23 harassment so severe and pervasive that it materially altered the conditions and privileges of
24 employment. Cheesecake Factory's actions are actionable under both federal and state law.

25 **ARGUMENT**

26 Federal Rule of Civil Procedure 24(a) provides, in relevant part, as follow:

1 (a) Intervention of Right. On timely motion, the court must permit anyone to
 2 intervene who...is given an unconditional right to intervene by a federal
 statute....

3 Fitzpatrick and Miller have the unconditional right to intervene conferred by federal statute. *See*
 4 42 U.S.C. § 2000e-5(f)(1). (“The person or persons aggrieved shall have the right to intervene
 5 in a civil action brought by the Commission”). Intervention is warranted because Fitzpatrick
 6 and Miller are the charging parties and are prohibited from filing a separate suit for violation of
 7 their federally-protected rights. *See McClain v. Wagner Elec. Corp.*, 550 F.2d 1115 (8th Cir.
 8 1977) (“if the Commission sues first, individual employees are not permitted to sue
 9 independently but may intervene as of right in the Commission's suit as provided by Fed. R.
 10 Civ. P. 24(a)”). Thus, Fitzpatrick and Miller’s only remedy is via intervention in this lawsuit.

11 Fitzpatrick and Miller’s request for intervention is timely under Rule 24(a). Although the
 12 Courts have held that intervention was timely when filed roughly four (4) months after
 13 commencement of the Commission’s suit [*U.S. v. Municipio De Vega Alta*, 244 F.R.D. 118 (D.
 14 Puerto Rico 2007)] and in one case ten years after the filing of the action and following the
 15 conclusion of a bench trial [*Winbush v. State of Iowa*, 66 F.3d 1471 (8th Cir. 1995)].

16 In this case, Fitzpatrick and Miller seek intervention less than six months since the
 17 Commission’s commencement of the action and before the Cheesecake Factory filed its answer.
 18 No discovery has occurred and no substantive hearings have taken place. Thus, Cheesecake
 19 Factory cannot claim prejudice if Fitzpatrick and Miller are allowed to intervene to assert their
 20 own claims in this case.

21 CONCLUSION

22 Plaintiffs Bryce Fitzpatrick and Albert Miller have an unconditional right to intervene in
 23 this action that is subject only to the requirement that intervention be timely sought.
 24 Accordingly, Fitzpatrick and Miller request that the Court allow them to intervene as plaintiffs
 25 in this action and file the attached Complaint-in-Intervention.

1 DATED this 11th day of December, 2008.

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5 By /s/ Jonathan A. Dessauls (#19439)
6 Jonathan A. Dessauls
7 *Attorneys for Plaintiffs-in-Intervention*
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CERTIFICATE OF SERVICE

I hereby certify that on December 11, 2008, I electronically transmitted the foregoing Motion to Intervene to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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